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TO THE
CRIMINAL LAW

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BRIEF AIDS

TO THE

CRIMINAL LAW,

WITH NOTES

ON THE

PROCEDURE AND EVIDENCE.

BY

HILTON KERSHAW, B.A.,

OF ST. JOHN'S COLLEGE, CAMBRIDGE, AND OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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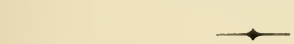
PREFACE.



The aim of this short work is to put before the Student the more salient features of the Criminal Law, in a condensed form, leaving it to him to further what knowledge he may gain from these pages by the study of the larger and more expletive text books dealing with the subject.

H. K.

St. James' Chambers,
Manchester,

January, 1897.

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Part I.

CRIMINAL LAW.

Chapter I.

Crime.

It is difficult to give an accurate definition of a crime. Blackstone says:—"Crimes are acts committed or omitted in violation of a public law forbidding or commanding them."

FitzStephen says:—"A crime is an act of disobedience to law forbidden under pain of punishment."

Bishop, 1 Or. Ls. 43:—"Those wrongs which the government notices as injurious to the public, and punishes in what is called a criminal proceeding in its own name."

Crimes Classified.

(A) Treasons; (B) Felonies; (C) Misdemeanours.

(A) Treasons strictly come under the category of felonies. (See *post*, p. 12—15.)

(B) **Felony.** According to Stephen, the term "felony" is derived from Fee and Lon—*fee* meaning a fief or feud; *lon* meaning price or value.

Others say it takes its derivation from the Greek word "φηλος," meaning an impostor.

The term "felony" was applied to those misdeeds which caused the forfeiture of the tenant's land or goods to the lord of the fee.

4 Bl. 95. "An offence which occasions a total forfeiture of either land or goods, or both, at common law, and to which capital or other punishment may be superadded, according to the degree of guilt."

Originally, if any offence was deemed a felony, it was generally thought that the law demanded capital punishment; and therefore, if a statute makes any new offence a felony, the law implies that it shall be punished with death, &c. (4 Bl. Com. 97.)

But felony exists without capital punishment, *e.g.*, manslaughter. And note the following instances where a crime was capital though not a felony—"standing mute at trial" and "heresy." (Bl. Com.)

By 33 & 34 Vict. c. 23 (the Felony Act, 1870), forfeiture was abolished.

(C) **Misdemeanours.** The differences between misdemeanours and felonies are small, and have reference to procedure. The term "misdemeanour" is applied to those offences other than felonies.

FitzStephen, 145. "This general name—misde-

meanours — bad behaviour — happily describes their general character. The principal offences included under this head are libel, conspiracy, and nuisance."

Some Differences between Felonies and Misdemeanours.

1. There are accessories only in felony.
2. A person may be arrested for a supposed felony, but not so for a supposed misdemeanour.
3. Misdemeanours are tried upon indictment, inquisition, or information.
4. Felonies are tried upon indictment.
5. In felony the prisoner has the right of peremptory challenge.

N.B.—The difference in the form of the oath taken by the jury and the manner of their being sworn.

The prisoner in a case of felony is given in charge to the jury, and during his trial they cannot separate, nor can the trial proceed unless the accused be present.

In misdemeanours the jury are allowed to separate during the trial, which may be proceeded with although the accused be absent.

The Object of Punishment.

"The effective quality in a punishment was its certainty, not its severity." (Beccar. c. 7.)

Punishment acts as a preventative of future crimes being committed in three ways. (See Stephen.)

(1) It may amend the offender.

(2) It may offer an example to other evildoers. "Ut pœna ad paucos, metus ad omnes perveniat." (Tully.)

(3) It may for the time or for good stop the further commission of evil deeds by the offender.

Essentials of a Crime.

"To make a complete crime cognizable by human laws, there must be both a will and an act." (FitzStephen.)

Will; Intention; Malice.

Will. To will an act, according to FitzStephen, is "to go through that inward state which, as experience informs us, is always succeeded by motion."

Intention. "Fixing the mind upon the act, and thinking of it as of one which will be performed when the time comes." (FitzStephen.)

To bring a person within the pale of our criminal law, "his intention must be such a state of mind as is forbidden by law." A. gives B. physic (poison), not knowing it to be such. No crime is committed, for the *mens rea*, or guilty mind, is absent: when this is present, it is termed "malice."

Malice. Though extremely hard to define, it has been said to be—

"A wrongful act done intentionally without just cause or excuse." (Littledale, J., in *Macpherson* v. *Daniels*, 10 B. & C. 272.)

"Un disposition a faire un male chose." (2 Roll. Rep. 461.)

"The dictate of a wicked, depraved, and malignant heart." (Foster, 256.)

It may either be "express" or "implied."

Express, *e.g.*, when A. deliberately and designedly kills B.; *e.g.*, by lying in wait for him.

Implied, *e.g.*, when A. wilfully poisons B., though no unfriendly feeling can be proved between them. (See 1 Hale, P. C. 455.)

Attempt. An attempt to commit a crime is an act done with the intention of committing that crime, and which would ultimately end in its commission if carried out.

"I think attempting to commit a felony is clearly distinguishable from intending to commit it. An attempt must be to do that which, if successful, would amount to the felony charged." (Cockburn, J.)

Every attempt to commit a crime is a misdemeanour at common law. In some cases it is felony, *e.g.*, attempt to murder. (24 & 25 Vict. c. 100, ss. 11—15.)

Classification of Exemptions from Criminal Liability.

Every one is deemed capable of committing a crime until the contrary is shown.

Exemptions:—

1. Absence of understanding, Want of malice.
   - (a) Infancy.
   - (b) Insanity.
   - (c) Intoxication.

2. Defect of will, Involuntary actions. } (a) Misfortune or accident. (b) Mistake or ignorance.

3. Compulsion by outward force. { (a) Duress. (b) State compulsion. (c) Necessity.

1 (a). **Infancy.** An infant under the age of seven years is incapable of committing any crime; he is presumed to be *doli incapax*, and this presumption is irrebutable by any evidence of precocity.

An infant is still *primâ facie* supposed to be *doli incapax* between the ages of seven and fourteen, unless evidence of precocity can be brought forward, *i.e.*, unless it can be shown that he was able to discern between good and evil. *E.g.*, a boy aged nine years was hanged for killing his friend, the accused showing that he knew he had done wrong by hiding the body. (1 Hale, P. C. 26, 27.)

A boy under fourteen cannot be convicted of rape, even though he may have arrived at the age of puberty. (See *post*, p. 46.)

Between the ages of fourteen and twenty-one an infant is supposed to have reached years of discretion, and is *doli capax*, and is liable to be convicted of any crime. He is excused, however, in those offences consisting of "nonfeasance," where the performance of the duty requires means, *e.g.*, "repairing highways." (*Vide* 4 Bl. 22.)

1 (b) **Insanity.** Every person is presumed to be sane and responsible for his or her actions until the contrary can be proved.

Lord Denman, in *R.* v. *Oxford*, 9 C. & P. 525, says:

"Persons must be taken to be of sound mind till the contrary is shown.

"The question is whether the prisoner was labouring under that species of insanity which satisfies you that he was quite unaware,—

"(1) Of the nature, character, and consequences of his act;

"(2) That the act was wrong."

If the accused has been found to be in such a state of mind by the jury, then he is not responsible for his actions, and cannot be guilty of any crime.

See *McNaughton's Case*, 1 C. & K. 130; 10 Cl. & Fin. 200.

R. v. *Davis*, 14 Cox, C. C. 563.

1 (c) **Drunkenness.** It is said drunkenness is no excuse for the commission of a crime; but it is sometimes taken into consideration by the jury when considering as to the specific intention of the person drunk. *E.g.*, in a case when a drunken man assaults another, the fact that he was drunk will not excuse him, for he is supposed to contemplate the result of his unlawful act, unless it can be shown he was too drunk to form any intention at all.

In crimes like forgery, where the degree of intention is higher, drunkenness may often be an excuse for the crime.

In *R.* v. *Cruse*, 8 C. & P. 541, Patterson, J., said:—"Drunkenness is no excuse for crime, yet it is often of very great importance in cases where it is a question of

intention. A person may be so drunk as to be utterly unable to form any intention at all."

In *R.* v. *Doherty*, 16 Cox, C. C. 306, Stephen, J., says:—"Although you cannot take drunkenness as any excuse for crime, yet when the crime is such that the intention of the party committing it is one of its constituent elements, you may look at the fact that a man was in drink in considering whether he formed the intention necessary to constitute the crime."

See also *R.* v. *Monkhouse*, 4 Cox, C. C. 55.

Drunkenness may be a defence to an indictment for attempting to commit suicide. (*R.* v. *Moore*, 3 C. & K. 319.)

2 (a) **Misfortune or Accident.** It is a good excuse for crime when the accident has taken place whilst the person who caused it was performing a lawful act, and exercising all the care he could command. *E.g.*, if A. is breaking stones, and the hammer's head suddenly flies off and kills B. who is standing by, here A. would not be liable.

2 (b) **Mistake or Ignorance.** Ignorance is of two kinds—(a) of law; (b) of fact.

(a) Ignorance of law will never excuse a person from crime. "Ignorantia legis neminem excusat."

Blackstone's reason is:—"Everyone is presumed to know the law, because he is present at the making of it by his representatives."

Austin's reason is:—"That if it were admitted as an

excuse, it would be universally pleaded, law would be ignored, and reduced to a nullity."

(b) Ignorance of fact is generally admitted as an excuse for crime provided the original intention was lawful.

In *R.* v. *Tolson*, a man having reasonable grounds for thinking his wife was dead, married again. Held, that ignorance of fact was a good excuse.

In *R.* v. *Prince*, L. R. 2 C. C. R. 154, a man abducted a girl under the age of sixteen, thinking her to be, on reasonable grounds, eighteen years of age. Held, that as the original act was immoral, the person did it at his peril, and that ignorance of fact was *no* excuse.

3 (a) **Duress.** An act done by reason of fear or danger to one's person is no crime; save where A., to save himself, kills B., an innocent party, in which case A. will be guilty of murder. (1 Hale, P. C. 51.) But mere threats to do harm or injury will not be sufficient, and the danger must concern one's person. Danger to property is not sufficient.

(b) **Compulsion by the State or by Law.** When the law compels a man to do any act, then that man is not guilty of any crime.

In the case of a *married woman* who commits a felony in the presence of her husband, she is presumed to act under his coercion. This is true in many felonies, but not in all. In treason, murder, robbery, manslaughter, this is not so, nor is it so in petty offences, forcible crimes, or in domestic matters.

"If a woman acts free and voluntarily, she ought to suffer." (See *R.* v. *Cohen*, 11 Cox, 99.)

A wife may be indicted with her husband for keeping a disorderly house.

(c) **Necessity.** See *R.* v. *Dudley and Stephens*, 14 Q. B. D. 273.

Stephen, J., says:—"If the accused can show that he did the act to avoid consequences which could not otherwise be avoided, and that the evil to be avoided was inevitable, and that no more harm was done than was reasonably necessary for that purpose, and that the evil inflicted was not disproportionate to the evil avoided, it will be a good excuse."

Principals and Accessories.

A Principal in the First Degree is the actual perpetrator of the crime present, when it is committed, either actively or constructively.

"Constructively," *e.g.*—

(1) A. wishing to poison B. employs C., an innocent agent (a child or an idiot), to do the deed. A. is a principal in the first degree.

(2) A. is a principal in the first degree when he is the author of B.'s death, which is caused by A. laying a trap for B.

A Principal in the Second Degree is one who is present, actively or constructively, aiding and abetting the

fact to be done, *e.g.*, A. murders B. while C. keeps guard.

Accessory before the Fact. One who, being absent at the commission of the crime, counsels, commands, or procures another to commit a felony, which is actually committed in pursuance of such instigation.

Accessory after the Fact. One who, knowing that a felony has been committed, relieves, receives, comforts or assists the felon with the intention of enabling him to escape from justice. (1 Hale, P. C. 618.)

In treasons and misdemeanours all are principals.

In felony only are there accessories.

Chapter II.

Offences against the Law of Nations.

Piracy.—See 11 & 12 Will. 3, c. 7 (4 & 5 Will. 4, c. 36, s. 22).
8 Geo. 1, c. 24.
18 Geo. 2, c. 30 (7 & 8 Vict. c. 2, s. 1).
5 Geo. 4, c. 113.

1 Russ. 253. This consists in such acts of robbery and depredation on the high seas which would amount to a felony if so committed on land.

Enemies can never commit piracy on each other. Originally piracy was tried at the Admiralty Court, but now it is triable at the Old Bailey or the Assizes.

Violating Ambassadors' Privileges.—By 7 Anne, c. 12, it was enacted :—

"That any person executing any process against an ambassador or any of his privileged servants, should be liable, on conviction before the Lord Chancellor and the Lord Chief Justice, or any two of them, to receive such penalties and corporal punishment as the said judge should think fit."

Offences against the Queen and her Government.

Treason.—FitzStephen says :—

"Treason is armed resistance, justified on principle, to the established law of the land.

"The offence comprises three classes of acts:—

"1. Execution or contrivance of acts of violence against the person of the Sovereign.

"2. Acts of treachery against the State in favour of a foreign enemy.

"3. Acts of violence against the internal Government of the country." (FitzStephen, 113.)

For a long time the law relating to treason was in a very vague condition. The following statute was passed to remedy this:—

Statute of Treasons (25 Edw. 3, c. 2, st. 5).

1. "When a man doth compass or imagine the death of our lord the King, our lady his Queen, or of their eldest son and heir."

   (The intent must be evidenced by some "overt act." Originally (Edw. 3), spoken words were held to be an overt act; but in 1629 it was decided that the spoken words should not be so regarded. Writing has been held to be an "overt act.")

2. "If a man do violate the King's companion, eldest daughter unmarried, or wife of the King's eldest son and heir."

   (This is treason in both parties, even if there is consent.)

3. "If a man doth levy war against our lord the King in his realm."

   (Here, if the object be specific, *e.g.*, to destroy a house, it is not treason, but a riot. But if the

intention is to destroy *all* houses it is treason. (See *R.* v. *Frost*, 9 C. & P. 129 ; *R.* v. *Gallagher*, 15 Cox, 292.)

4. "If a man be adherent to the King's enemies in his realm, giving them aid and comfort in the realm or elsewhere."

   (Enemies here mean foreign enemies. This offence must be evidenced by some "overt act.")

5. "If a man counterfeit the King's Great or Privy Seal, or introduce foreign or counterfeit money."

   (These are now a felony. 24 & 25 Vict. c. 98, s. 1.)

6. "If a man slayeth the Chancellor, Treasurer, or King's justices of the one bench or the other, justices in eyre or justices of assize, and all other justices assigned to hear and determine, being in their offices."

In the reign of Henry VIII. several offences were made treasons for the time being, *e.g.*, "Stealing cattle by Welshmen" ; "Poisoning."

These treasons were, however, done away with in the reign of Edward VI.

Modern Treasons.

1. By 1 Anne, st. 2, c. 17, s. 3, it was treason to prevent the person entitled under the Act of Settlement from succeeding to the Crown. (This must be evidenced by some "overt act.")

2. By 6 Anne, c. 7, representing that any other person has a right to the Crown other than

under the Act of Settlement, maliciously, advisedly and directly, by writing, or printing, or saying that the Sovereign, with the sanction of Parliament, may not make laws and statutes to bind the Crown, and its descent.

3. By 36 Geo. 3, c. 7, s. 1, "Compassing, imagining, inventing, devising or intending death or destruction, or any harm tending to death or destruction, maim or wounding, imprisonment or restraint, of the person of the Sovereign."
4. By 3 & 4 Vict. it was treason to aid and abet the marriage of any of the Queen's issue under eighteen.

An Act passed, 11 & 12 Vict. c. 12, s. 1, made all the offences, save those against the person of the Sovereign, triable as treason-felonies, with punishments varying at the discretion of the judges.

By 7 & 8 Will. 3, c. 3, no prosecution for treason can take place after three years from the time of the commission of the offence, unless the treason is one of designed assassination of the Sovereign.

In treason the prisoner may address the jury.

Misprision of Treason. The knowledge and concealment of treason, without assent thereto, which would make the party a principal. In the reign of Mary capital punishment for this offence was abolished.

Coinage Offences. By 24 & 25 Vict. c. 99, ss. 2, 14, 18, &c.,

"Whosoever shall falsely make or counterfeit any

coin resembling, or apparently intended to resemble or pass for the Queen's gold or silver coin, the Queen's copper coin, foreign gold or silver coin, colouring coin, impairing coin, is guilty of felony."

Counterfeiting foreign coin, other than gold or silver, is a misdemeanour. (Sect. 22.)

Defacing coin is a misdemeanour. (Sect. 17.)

Importing counterfeit coin, gold or silver, is a felony. (Sect. 7.)

Importing foreign counterfeit coin, gold or silver, is a felony. (Sect. 19.)

Exporting current counterfeit coin is a misdemeanour.

Uttering gold, silver or copper coin, knowing the same to be false, is a misdemeanour. (Sects. 8, 9, 15.)

Uttering spurious coin. (See sect. 13.)

Having three or more counterfeit gold or silver coins in one's possession, and knowing them to be so, and with intent to utter the same, is a misdemeanour. (Sect. 11.)

If the coins are copper, the offence is punished with imprisonment up to one year. (Sect. 15.)

Making instruments, tools, &c., buying or selling them, having them in the possession for the purpose of coining gold or silver, or foreign coin, is a felony (sect. 34); punishment up to life. If for the purpose of coining Queen's copper coin, punished with penal servitude up to seven years. (Sect. 14.)

As to uttering, see *R.* v. *Hermann*, 4 Q. B. D. 284.

Offences against Religion.

Apostacy. Means the total renunciation of the Christian faith. Punishment:—1st offence, incapacity to hold any office; 2nd offence, three years' imprisonment, without bail. (9 Will. 3, c. 35.)

Blasphemy. Means the scoffing at Christianity. The offence is punished by fine and imprisonment.

Profanation of the Sabbath Day. 29 Car. 2, c. 21. No one may do any work of his ordinary calling on the Sabbath Day (works of necessity and charity excepted). Penalty, five shillings.

And by the same Act:—No one may expose for sale any wares. Penalty, forfeiture of goods.

Nor may drovers, &c. travel on a Sunday. Penalty forty shillings. (21 Geo. 3, c. 49). Any house used for public debate or entertainment on the Lord's Day, to which people are admitted on payment of money, shall be deemed a disorderly house.

Heresy is the denial publicly of some of the essentials of Christianity. The offence is tried by an Ecclesiastical Court.

Offences against the Public Morals.

Bigamy. (24 & 25 Vict. c. 100, s. 57.) This is the offence of marrying a second time while the former legal wife or husband is still alive. The second marriage is void, and the offence is a felony.

If the husband or wife have not known or heard of the other for seven years, the legal presumption is that he or she is dead. This is what is called the seven years' rule. The second marriage is not a felony,—

1. If the prisoner can prove he or she was not one of her Majesty's subjects, and that the second marriage was not contracted in England or Ireland.
2. Where the party at the date of the second marriage has been divorced from the first marriage.
3. Where the first marriage has been declared null and void by the sentence of a competent Court.

Note the following cases:—

R. v. *Jones*, 11 Q. B. D. 118.
R. v. *Willshire*, 14 Cox, 541.
R. v. *Tolson*, 23 Q. B. D. 170.
R. v. *Curgerven*, L. R. 1 C. C. R. 1.
R. v. *Allan*, L. R. 1 C. C. R. 376.

Common Nuisance. This is an act of commission or omission, the result of which causes annoyance to the Queen's subjects at large. A private nuisance is opposed to a common or public nuisance, whereas the latter appeals to the many, and the former only to a few.

"A public or common nuisance is such an inconvenient or troublesome offence as annoys the whole community in general, and not merely some particular person, and therefore this is indictable." (4 Bl. Com. 167.)

"Nuisance is the wrong done to a man by unlawfully

disturbing him in the enjoyment of his property, or in some cases in the exercise of a common right." (Pollock, 3rd ed. 352.)

"A common nuisance is an offence against public convenience and economical regimen of the State; and it consists in either doing a thing to the annoyance of all the lieges, or neglecting to do some good which the common welfare requires." (Hawk. P. C. bk. 1, c. 75, 51.)

See *St. Helens Smelting Co.* v. *Tipping*, 11 H. L. C. 650.
R. v. *Train*, 2 B. & S. 640.
Jones v. *Powell*, Palm. at p. 539.
R. v. *Smith*, 1 Str. 704.
2 Chitty's Cr. Law, 647.
R. v. *Wigg*, 2 Ld. Raym. 1163.
R. v. *White*, 1 Burr. 333.
R. v. *Pappineau*, 2 Str. 686.
R. v. *Rice and Walton*, L. R. 1 C. C. R. 21.
R. v. *Grey*, 4 F. & F. 73.
R. v. *Stevenson*, 3 F. & F. 106.
R. v. *Jarvis*, 3 F. & F. 108.
R. v. *Crawley*, 3 F. & F. 109.

Highways and Bridges. See 4 Bl. Com. p. 167.

Highways.

See 5 & 6 Will. 4, c. 50.
4 & 5 Vict. cc. 51, 59.
8 & 9 Vict. c. 71.
25 & 26 Vict. c. 61.
R. v. *Russell*, 6 East, 427.
Barnes v. *Ward*, 9 C. B. 392.
R. v. *Gricsley*, 1 Vent. 4.

Turnpike Roads. See 3 Geo. 4, c. 126.
4 Geo. 4, c. 95.
24 & 25 Vict. c. 97, s. 34.

Bridges. 55 Geo. 3, c. 143.

Offensive or Dangerous Trades or Manufactures.
See *R.* v. *Ward*, 5 L. J. K. B. 221.
R. v. *Cross*, 2 C. & P. 483.

Disorderly Houses. 48 & 49 Vict. c. 69, s. 13.

Lotteries. See 10 & 11 Will. 3, c. 17, s. 1.
42 Geo. 3, c. 119, s. 1.

Exposing a Person infected with Disease. *R.* v. *Vantandillo*, 4 M. & S. 73.

Unlicensed Horse Races. 42 & 43 Vict. c. 18.

Furious Driving. 24 & 25 Vict. c. 100, s. 35.

Adulteration of Food. 38 & 39 Vict. c. 63, ss. 4, 5, 25.
R. v. *Dixon*, 3 M. & S. 11.

Eavesdropping. See 4 Bl. Com. 167.

Vagrancy.

1. **Idle and Disorderly Persons**, *i.e.*, refusing to work and becoming chargeable to the parish.
Begging. 5 Geo. 4, c. 83, s. 3.
Prostitutes behaving indecently in a public place. Punishment, not exceeding one month.

2. **Rogues and Vagabonds.** Those who are guilty of any of the above offences a second time:—

Playing or betting in a public place. (36 & 37 Vict. c. 38.)

A railway carriage in motion has been held to be a public place. (*Langrish* v. *Archer*, 52 L. J. M. C. 47.)

Publicly exposing one's person.

See *R.* v. *Holmes*, 1 Dears. C. C. R. 207.
R. v. *Thallman*, L. & C. 336.
R. v. *Harris*, L. R. 1 C. C. R. 282.
R. v. *Wellard*, 14 Q. B. D. 63.

Publicly exposing obscene prints, &c.

Lodging in a barn or outhouse without any means of livelihood, and not giving a good account of one's self.

Punishment, not exceeding three months.

3. **Incorrigible Rogues.** Those who are guilty a second time of being a rogue and vagabond.

Resenting capture by an officer as a rogue and vagabond. (5 Geo. 4, c. 83, s. 5.)

Punishment, not exceeding twelve months, with or without a flogging.

Offences against the Public Justice.

Escape. This offence is committed when a prisoner gets free, either by his own efforts or those of others, without force being used.

If a prisoner gets free from the custody of an officer before he is imprisoned—punishment, fine and imprisonment.

If the officer *negligently* allows the prisoner to escape, he is punishable with fine; if *voluntarily*, he is guilty of the same offence as the prisoner, and liable to the same punishment.

Private persons, ditto.

Prison Breach. The offence of prison breach is committed when force is used by the prisoner to gain his liberty. (See 28 & 29 Vict. c. 126, s. 37.)

If the prisoner is imprisoned for treason or felony, the offence of prison breach is a felony. (23 Edw. 1.)

If he is in custody for any other offence, then the offence of prison breach is a misdemeanour punishable by fine and imprisonment.

In felony the escape of the prisoner must be proved; in misdemeanour this is not necessary.

Rescue. If the real offender is convicted, then the rescuer is guilty of the same offence as the one rescued. If not convicted, the rescuer is guilty of misdemeanour, and punished by fine and imprisonment.

Rescuing a murderer is a felony, which may mean a life sentence or imprisonment not exceeding three years. (7 Will. 4 & 1 Vict. c. 91, s. 1.)

Pound Breach. *I.e.*, rescuing cattle from the custody of the law.

Perjury. When in some competent judicial proceeding a person swears wilfully, absolutely, and falsely in

a matter material to the issue in question after the taking of a lawful oath. (See Hawk. P. C. b. 1, c. 69, s. 1 ; 3 Inst. 164.)

Materiality. Stephen says :—"A statement of such a nature as to affect in any way the probability of anything to be determined by the proceeding or the credit of any witness."

Maule, J. :—"Every question that is properly asked in a court of justice ought to be properly answered, and such answer is material to that judicial proceeding."

Subornation of Perjury. This is the offence of procuring another to take such a false oath as would constitute perjury in the principal. (4 Bl. 138.)

Bribery. See 52 & 53 Vict. c. 69. This is the offence of influencing a public person to perform his duty in a dishonest manner. A misdemeanour.

Bribery at elections. *Vide* Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), ss. 1, 2, 3. See also 17 & 18 Vict. c. 102, s. 2.

Barratry. This is the offence of stirring up suits and quarrels, at law or otherwise, between the Queen's subjects. The offence is a misdemeanour punishable with fine or imprisonment. (4 Bl. 134.)

Maintenance. Signifies an unlawful interference in a suit or quarrel which in no way concerns one, as by assisting either side with money or the like. (See Hawk. P. C. bk. 1, c. 83, s. 1.) It is a misdemeanour punished by fine or imprisonment.

Champerty is a kind of maintenance where the person offering his assistance bargains with the plaintiff or defendant for a portion of the proceeds of the action.

Embracery is an attempt to influence the mind of a jury by the promise of money, &c.

It is a misdemeanour punished with fine and imprisonment. (See 6 Geo. 3, c. 50, s. 61.)

Compounding a Felony.

"*Theft Bote.* An offence is committed by a person who agrees with the thief not to prosecute him on the return of the stolen property. An advertisement saying that no question will be asked on the return of the goods renders the author as well as the printer liable to a fine of 50*l.* (24 & 25 Vict. c. 96, s. 102.)

Jonathan Wilde's Offence. This was accepting a reward under the pretence of helping the owner to regain his stolen property. (24 & 25 Vict. c. 96, s. 101.)

Misprision of Felony is the concealment of some felonious act which has been committed by another. If A. sees B. commit a felony and takes no steps to arrest him, he is guilty of the offence of misprision of felony, which is a misdemeanour punished by fine and imprisonment.

Offences against the Public Peace.

Affray. The fighting of two or more persons in a public place to the terror of her Majesty's subjects. If

the fighting occurs in private, it is an assault. (4 Bl. Com. 145.)

Unlawful Assembly. The gathering together of three or more in such a manner that renders courageous persons to fear a breach of the peace. (See *Beatty* v. *Gillbanks*, 9 Q. B. D. 308.)

"A meeting which attempted to carry out any common purpose, lawful or unlawful, in such a manner as to give other persons reason to fear a disturbance of the peace." (Charles, J., in *R.* v. *Graham and Burns.*)

Rout. This offence is complete when three or more unlawfully assemble, and proceed to carry out the object of their assembly.

Riot. Where three or more have actually carried out the object of their unlawful assembly to the terror of the public, and causing a breach of the peace.

Riotous Assembly. This is an offence when twelve or more persons have unlawfully assembled together, and have remained so one hour after a proclamation (the Riot Act) read to them by the mayor, sheriff, or justice of the peace. The offence is a felony. (1 Geo. 1, st. 2, c. 5.)

Threats. Sending a letter, knowing the contents, containing a threat to murder. (24 & 25 Vict. c. 100, s. 16.)

Sending a letter, knowing the contents, containing a threat to burn, &c. (24 & 25 Vict. c. 97, s. 50.)

Sending a letter, knowing contents, demanding property or money with menaces. (24 & 25 Vict. c. 97, s. 44.)

Demanding property, with menaces, with intent to steal. (24 & 25 Vict. c. 96, s. 45.)

Sending letters, knowing the contents, with threats to accuse of crime with intent to extort. (Sect. 46.)

Accusing, or threatening to accuse, with intent to extort. (Sect. 47.)

Inducing a person to execute a deed by threats. (Sect. 48.)

Threatening to publish a libel with intent to extort. (6 & 7 Vict. c. 96, s. 3.)

Procuring the defilement of women by threats. (48 & 49 Vict. c. 69, s. 3.)

Libel. "A malicious defamation, expressed either in printing or writing, intending either to blacken the memory of one who is dead, or the reputation of one who is alive, by exposing him to public hatred, contempt or ridicule." (1 Hawk. c. 73.)

A false statement by writing, picture or sign, which exposes a person to public hatred, ridicule, or contempt, which accuses him of an indictable offence, which causes him to be avoided in society, which tends to injure him in his trade or profession: the offended one may proceed against the offender criminally (by indictment or information), or by a civil action.

It is a good defence in a civil action that the words spoken were true, but in a criminal action this is not so; for in addition to the words being true, the public at large must benefit by their publication. Formerly, it was no defence to an indictment for libel to urge that the statement was true, the gist of the offence being a

breach of the peace, and the greater the offence the more likelihood of the peace being broken.

Lord Campbell's Act (6 & 7 Vict. c. 96), s. 36, says:—"That the Court in pronouncing sentence may consider whether the guilt of the defendant is aggravated or mitigated by the plea and evidence of the truth."

In the case of *Lawson* v. *Labouchere*, the defendant tried to put forward evidence of truth and justification when before the magistrate, which the magistrate refused to admit. (*R.* v. *Carden*, 5 Q. B. D. 1; 49 L. J. M. C. 1.)

In 1881, the Newspaper Libel Act was passed, which enabled the magistrate in newspaper libel only to hear evidence of truth and justification, and to dismiss the charge if in his opinion no jury would convict.

No criminal proceedings can be commenced in libel without the written fiat of the law officers of the Crown. (44 & 45 Vict. c. 60, s. 3.)

In libel, the plaintiff must prove he is the particular person referred to.

No action for libel will lie if the defendant can prove that the alleged libel was a fair comment on a matter of public interest, and that he acted in a *bonâ fide* manner without any malice.

There must be a publication; though the slightest matter will be deemed to be such a publication.

See *Baldwin* v. *Elphinstone*, 2 W. Bl. 1037.
Kiene v. *Ruff*, 1 Clarke, Iowa, 482.
Delacroix v. *Thevenot*, 2 Stark. 63.

Williamson v. *Freer*, L. R. 9 C. P. 393; 43 L. J. C. P. 161; 30 L. T. N. S. 332; 22 W. R. 878.

Whitfield v. *S. E. Rail. Co.*, E. B. & E. 115.

Sending a defamatory letter to a wife *re* the husband constitutes a publication. (*Wenman* v. *Ash*, 13 C. B. 836; 22 L. J. C. P. 190.)

In libel, the prosecution has to establish the following facts:—

1. The making and publication of the libel.
2. That the writing so made and published was of a libellous character.

For some time the jury decided the first question, and the Court the second.

Fox's Act, 1773 (32 Geo. 3, c. 60), enacted that the jury should decide (1) and (2).

Some differences between libel and slander. Slander is in its nature transient—spoken words. Libel is permanent—written statements. Special damage need not be proved in libel. Special damage must be proved in slander, save in the four following cases:—

(a) Where the plaintiff is charged with committing a criminal act. (*Webb* v. *Beran*, 11 Q. B. D. 609.)

(b) Where the plaintiff is a female, and she is deemed unchaste. (Slander of Women Act, 1891.)

(c) Where the plaintiff is said to have an infectious disease. (*Villers* v. *Monsley*, 2 Wills. 403.)

(d) Where the words spoken relate to the trade or business of the offended party. (*Millis* v. *David*, L. R. 9 C. P. 118.)

Prize Fighting. A mere exhibition of skill in sparring is a legal entertainment, but not so a fight until one or the other gives in from its effects. (*R.* v. *Orton*, 14 Cox, C. C. 226.)

"All these prize fights are illegal." (Burrough, J., *R.* v. *Billingham*, 2 C. & P. 234.)

"Prize fights are altogether illegal." (Pattison, J., *R.* v. *Perkins*, 4 C. & P. 537.)

If one of the pugilists is killed all "those present and approving" are guilty of manslaughter (*R.* v. *Murphy*, 6 C. & P. 103); but mere casual onlookers are not guilty, unless it can be shown that they were present for the purpose of seeing the fight, for "non-interference to prevent a crime is not in itself a crime." (Hawkins, J.)

"It is no criminal offence to stand by." (*R.* v. *Coney and others*, 8 Q. B. D. 534; *R.* v. *Atkinson*, 11 Cox, C. C. 330.)

Offences relating to Game.

Poaching. See *R.* v. *Sutton*, 13 Cox, C. C. 648.
9 Geo. 4, c. 69, s. 9.

"If any persons to the number of three or more together shall by night unlawfully enter or be in any land, whether open or enclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, cross-bow, fire-arms, bludgeon, or any other offensive weapon, each

and every of such persons shall be guilty of a misdemeanour."

As to what are offensive weapons—

See *R.* v. *Grice*, 7 C. & P. 803 (stones).

R. v. *Merry*, 2 Cox, C. C. 240 (stick).

R. v. *Goodfellow*, 1 C. & K. 724; 1 Den. C. C. R. 81.

R. v. *Whittaker*, 1 Den. C. C. R. 310.

If one is armed all are armed.

Taking or killing hares or rabbits in the night time (24 & 25 Vict. c. 96, s. 17).

Offences against Public Trade.

Smuggling. See 39 & 40 Vict. c. 36.

Conspiracy. See 30 & 31 Vict. c. 35, s. 1; 22 & 23 Vict. c. 17, s. 1; 33 Ed. 1 (earliest mention), "Ordinatio de conspiratoribus."

"An agreement by two or more persons:—

(1) To do an act which is unlawful.

(2) To do a lawful act by unlawful means. (*Mulcahy* v. *Reg.*, L. R. 3 H. L. 317. See also *R.* v. *Parnell*, 14 Cox, C. C. 508.)

(3) To do an act of injury to a third party. (Cockburn, C. J., L. R. 1 C. C. R. 273-7.)

"It is sufficient to constitute a conspiracy if two or more combine by fraud and false pretences to injure another."

It is not necessary that the acts agreed to be done

should be acts which if done would be criminal. It is enough if the acts agreed to be done although not criminal are wrongful, *i.e.*, amount to a civil wrong. (*R.* v. *Howell*, 4 F. & F. 160.)

See *R.* v. *Orman*, 14 Cox, C. C. 381 (not criminal acts when done by an individual).

R. v. *Manning* 12 Q. B. D. 241 (conspiracy must be of two at least).

Chapter III.

Offences against the Property of Individuals.

Larceny. (24 & 25 Vict. c. 96.)

"The felonious taking and carrying away of the personal goods of another." (Blackstone.)

"The unlawful taking and carrying away of things personal, with intent to deprive the right owner of the same." (Stephen.)

"A taking and carrying away of the personal goods of another, of any value, against the will or without the consent of the owner, without any *bonâ fide* claim of right, with a felonious intent." (Arch.)

Larceny may be either simple or compound; the latter is accompanied with circumstances of aggravation.

Ownership of Property. A person who has a right against persons generally to do to any object anything which he is not specifically forbidden to do, and a right to prevent all other persons from doing with regard to it any act which they are not specifically authorized to do by law or by his consent, is termed the owner of the object.

Possession. A person is said to be in the possession of an object when he is so situated with regard to it that he can act as owner to the exclusion of the whole

world, and when circumstances are such that he may be presumed to do so in case of need.

Custody. Such a relation towards the thing as would constitute possession if the person having custody had it on his own account.

The goods which are capable of being stolen must be personal goods, and the article stolen must be of some value. (*R.* v. *Morris*, 9 C. & P. 349.) And there must be an actual taking and carrying away against the will of the owner.

Asportation (carrying away).

See *R.* v. *Poynton*, L. & C. 247.
R. v. *Thompson*, 1 Moo. C. C. 78.
R. v. *Walsh*, 1 Moo. C. C. 14.
R. v. *Cherry*, 2 East, P. C. 556.
R. v. *Wilkinson*, 1 Hale, 508.

Larceny by Finding. If A. finds an article of which he knows the owner or believing the owner can be found, and keeps the same, he is guilty of larceny.

See *R.* v. *Pope*, 6 C. & P. 346.
R. v. *Lamb*, 2 East, P. C. 664.

If at the time of the finding his intentions are honourable, the fact that he afterwards changes his mind and decides to keep the article does not make him legally a thief.

R. v. *Christopher*, 28 L. J. M. C. 35.
R. v. *Thurborn*, 18 L. J. M. C. 140.

Larceny by Bailee. A bailee is a person to whom a thing is delivered for various purposes, "for carriage, &c.," "for work to be done on it."

To constitute a bailment the thing must be returned in its original state to the bailor, and if the bailee converts it fraudulently to his own use or to the use of any other save the bailor, he is guilty of larceny, although he shall not "break bulk" or otherwise determine the bailment.

Breaking bulk means changing the thing from a whole to a number of pieces and so determining the bailment.

Larceny by Trick.

See *R.* v. *Buckmaster*, 20 Q. B. D. 182.
R. v. *Oliver*.
R. v. *Robson*, R. & R. 413.

If a person through the fraudulent representation of another delivers to him a chattel intending to pass the property in it, the latter cannot be indicted for larceny, but only for obtaining the chattel under false pretences. (*Powell* v. *Hoyland*, 6 Exch. 70.)

Larceny by Mistake.

See *R.* v. *Ashwell*, 16 Q. B. D. 190.
R. v. *Flowers*, 16 Q. B. D. 643.
R. v. *Middleton*, L. R. 2 C. C. R. 38.

Larceny in a Dwelling-house. (24 & 25 Vict. c. 96, ss. 60, 61.)

There need be neither a breaking nor an entry, as in house-breaking.

Larceny in Ships or Wharfs, &c. (24 & 25 Vict. c. 96, s. 63.)

Robbery is the forcible taking from the person of another, or in his presence, against his will, his

valuables, money or goods by violence, or putting him in fear.

Violence. See *R.* v. *Steward*, 2 East, P. C. 713.

Fear. See *R.* v. *Taplin*, 2 East, P. C. 712.

It is not necessary to prove both the above, if the goods or money were given up under fear. It constitutes a robbery although no violence be used.

The danger need not threaten the person robbed, it is sufficient if it relate to his family or those dear to him. See *R.* v. *Astley*, 2 East, P. C. 729.

As to robbery by threats—

(See *R.* v. *M'Grath*, L. R. 1 C. C. R. 205.)

R. v. *Lovett*, 8 Q. B. D. 185.

The force or fear must precede the robbery. It is robbery if violence is used without fear. (Hawk. P. C. b. 1, c. 34, s. 8.)

Receiving stolen goods knowing them to have been stolen. See 24 & 25 Vict. c. 96, s. 91.

This is one offence where the prisoner's previous character may be brought in as evidence.

Evidence may be given to show that there was in his possession other property stolen within twelve months in order to prove his guilty knowledge.

Embezzlement. (24 & 25 Vict. c. 96, s. 68.)

Embezzlement by Officers of Savings Banks. (26 & 27 Vict. c. 87, s. 9.)

The offence consists in the unlawful appropriation by a clerk or servant of goods or money received by him

on behalf of his master before reaching the actual possession of the master, otherwise it would be larceny.

Example—A., a clerk, receives 10*l.* from B., being the price of an article sold by the master. A. appropriates the money before it comes into the master's possession.

A. is guilty of embezzlement.

A. takes the money from the till. A. is guilty of larceny.

The person indicted must be a clerk or servant.

In *R.* v. *Negus* (L. R. 2 C. C. R. 34) Blackburn, J., says:—"The test is very much this, viz., whether the person charged is under the control and bound to obey the orders of his master."

The employment (to constitute the position of clerk or servant) need not be permanent. (See *R.* v. *Hughes*, 1 Moo. C. C. 370.)

False Pretences. (24 & 25 Vict. c. 96, s. 88.)

"An offence of obtaining money, &c., by means of a false representation by words, writing or conduct, that some fact exists or existed." (St. Dig. 247.)

The difference between False Pretence and Larceny is very small, and is as follows:—

In larceny, the owner has no intention of parting with his property in the thing stolen.

In false pretences, he does part with it, but it is obtained from him by fraud. (See Arch. 374; *White* v. *Garden*, 10 C. B. 927.)

The false pretence must be of a promise or a future

event. (*R.* v. *Welman*, Dears. C. C. 188, per Jervis C. J.)

It must be of some existing fact which the person deceived is ignorant of, and in consequence of which he parts with his goods or money.

See *R.* v. *Cooper*, 2 Q. B. D. 510.
R. v. *Barnard*, 7 C. & P. 784.
R. v. *Foster*, 2 Q. B. D. 301.
R. v. *Ardley*, L. R. 1 C. C. R. 301.

Statements in "mere praise, or exaggeration or puffing," on account of which money is given, does not make the defendant capable of being convicted of obtaining money by false pretences. (See *R.* v. *Bryan*, 26 L. J. M. C. 84.)

Note also, *R.* v. *Cooper*, 2 Q. B. D. 510.
R. v. *Hazelton*, L. R. 2 C. C. R. 134.
R. v. *Coulson*, 1 Den. 592.
R. v. *Naylor*, L. R. 1 C. C. R. 4.
R. v. *Martin*, L. R. 1 C. C. R. 56.
R. v. *Mills*, Dears. & B. 205.
R. v. *Kilham*, L. R. 1 C. C. R. 261.

Burglary. (24 & 25 Vict. c. 96.)

"Whosoever shall enter the dwelling-house of another with intent to commit any felony therein, or being in such a dwelling-house shall commit any felony therein, and shall in either case break out of the said dwelling-house in the night, shall be deemed guilty of burglary."

A burglar, according to Lord Coke, is:—"He that in the night time breaketh and entereth into a mansion

house of another of intent to kill some reasonable creature or to commit some other felony within the same, whether his felonious intent be executed or not."

Place. It must be a dwelling-house or some building connected by the main building by a covered enclosed passage. (*R.* v. *Jenkins*, R. & R. 244.)

Section 53 of the above Act says:—"No building, although within the same curtilage with any dwelling-house and occupied therewith, shall be deemed to be part of such dwelling-house, unless there shall be a communication between such building or dwelling-house either immediate or by means of a covered or enclosed passage leading from the one to the other."

Night-time. This is settled to commence at 9 p.m. and end at 6 a.m. (24 & 25 Vict. c. 96, s. 1.)

Breaking and entering. These must take place by night. The breaking may be one night and the entry another. (*R.* v. *Smith*, R. & R. 417.) There must be a breaking of some part of the building, internal or external. To gain admittance by fraud is constructive breaking. It does not constitute a breaking to get through a half-closed window or an open door, but to get down a chimney has been held otherwise, so has lifting a cellar-flap. (*R.* v. *Russell*, 1 Moo. C. C. 377.)

Getting through a hole in the roof is not a sufficient entry to constitute a burglary. (*R.* v. *Brice*, R. & R. 450.)

Entry. The least entry of any part of the offender's body, or any instrument held in the hands for the

purpose of committing a felony, will suffice. (*R.* v. *Hughes*, 1 Leach, 406.)

When the entry cannot be proved, but the breaking with an intent to commit a felony can, the prisoner is guilty of an attempt to commit a burglary. (*R.* v. *Spanner*, 12 Cox, C. C. 155.)

It is a burglary by 24 & 25 Vict. c. 96, s. 51, to enter the dwelling-house of another with an intent to commit a felony therein, or for a person who in such dwelling-house having committed a felony therein, in either case to break out.

House-breaking. The differences between this offence and that of burglary are—

(a) house-breaking is committed by day;

(b) and relates to the breaking of shops, warehouses, &c.,

to which the crime of burglary does not.

See 24 & 25 Vict. c. 96, s. 55.

Forgery. See 24 & 25 Vict. c. 98.

"The fraudulent making or altering of a writing to the prejudice of another man's right." (Blackstone.)

A false making (a making *malo animo*) of any written instrument for the purpose of fraud or deceit. (2 East, P. C. 852.)

It is the fraudulent making or altering of an instrument or part of one with the intention of making it appear what it is not with intent to defraud. (See Blackburn, J., in *R.* v. *Ritson*, L. R. 1 C. C. R. 200.)

The forgery must be of some writing or document, viz.:—*R.* v. *Closs*, Dears. & B. C. C. 460; 7 Cox, 494; 27 L. J. M. C. 54.

The forgery need not be of the whole instrument or document, and a mere alteration will suffice. (1 Hawk. c. 70, s. 2.)

It must be proved the defendant knew the instrument to be forged. The crime is closely akin to that of false pretences. (FitzS. 141.)

Arson. Coke defines it as "the malicious and voluntary burning the house of another by night or by day." (3 Inst. 66.)

"Arson is the malicious and unlawful setting fire to any real property or to any vegetable produce stacked or otherwise stored for use, or to any personal property so connected with or adjacent to any real property, that by setting fire thereto such real property would be endangered." (Stephen, J.)

The crime is regulated by 24 & 25 Vict. c. 97, which says:—"Whosoever shall unlawfully and maliciously set fire to any matter or thing being in, against or under any building under such circumstances that if the building were thereby set on fire the offence would amount to a felony, shall be guilty of felony." (See *R.* v. *Child*, L. R. 1 C. C. R. 307.)

At common law an actual burning of the house or part of it was required. "No flames need be visible." (*R.* v. *Stallion*, 1 Moo. C. C. 398.)

The essential of the crime is the intent to defraud or injure.

The house burnt must be that of another. Therefore, the burning of a man's own house is no felony at common law; but if A. wilfully sets fire to his own

house, and in doing so burns B.'s it is a felony. (*Probert's Case*, 2 East, P. C. 1030.)

Offences against the Person of Individuals.

Homicide. "The killing of a human being by a human being."

It may be divided into three classes.

(1) **Justifiable**; (2) **Excusable**; (3) **Felonious.**

(1) **Justifiable Homicide.** This is where the killing is sanctioned and ordered by the law. Examples:—

(a) Where a criminal is legally executed by the proper person.

(b) Where a law officer kills a person who prevents him from executing his duty, after it has been shown that the killing was necessary. This will be excusable or justifiable homicide or manslaughter according to the facts of the case.

(c) When the killing takes place to prevent a crime being committed (robbery, arson, burglary). (See 1 East, P. C. 271, 272.)

But the crime must be a "forcible and atrocious" one (*e.g.*, rape), and the killing must be the last means resorted to.

(2) **Excusable Homicide.** Examples:—

(a) Killing in self-defence, "*se defendendo.*"

(b) Killing by accident in carrying out a legal act or in a manner in which malice aforethought is not present.

In cases of killing in self-defence the person

who was assailed must show that he did not cause the death of the assailant until he had exhausted all other means in his power for the protection of his own personal safety.

(3) **Felonious Homicide.—Murder.** Coke defines it in the following way:—"When a person of sound memory and discretion unlawfully killeth any reasonable creature in being and under the King's peace with malice aforethought, either express or implied."

"Sound memory and discretion"—Idiots, lunatics, and infants "*doli incapax*" are excluded.

Any reasonable creature in being and under the King's peace—foreign enemies engaged in war are excluded. A child becomes a living being when it has proceeded in a living state from the body of its mother.

"Malice"—"The wilful doing of a wrongful act without just cause or excuse." (Per Bayley, J.)

The assailed must die within one year and a day to render his assailant guilty of murder.

Manslaughter. "The unlawful killing of another without malice aforethought." (Blackstone.)

This is of two kinds:—

(1) On sudden heat (voluntary).

(2) In the commission of some unlawful act (involuntary).

(1) **Voluntary.** Examples:—

Two men meet and quarrel and one kills the other. (*R.* v. *Fisher*, 8 C. & P. 182.)

When A. has provocation and kills B., *e.g.*, when B.

is taken in adultery with A.'s wife. (See *R.* v. *Maddy*, 1 Vent. 158.)

> "Manslaughter therefore on a sudden provocation differs from excusable homicide '*se defendendo*' on a sudden affray in this: that in the one case there is an apparent necessity for self-preservation to kill the aggressor; in the other there is no necessity, being only a sudden act of revenge." (Stephen.)

Involuntary. This differs from excusable homicide, as in the latter the act is lawful and in the former the act is unlawful which causes death.

> *Example:* If a man throws stones from a roof when people are in the habit of frequenting the place below, after warning them, though not intending to kill anyone, the original act is unlawful.
>
> See *R.* v. *Salmon*, 6 Q. B. D. 79.
>
> *R.* v. *Bradshaw*, 14 Cox, C. C. 83.

If unlawful act is a felony then the killing is murder.

"I think that instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say any act known to be dangerous to life and likely in itself to cause death, done for the purpose of committing a felony which caused death, should be murder. As an illustration of this, supposing a man intending to commit rape on a woman, and without any wish to kill her, squeezed her by the throat to overpower her and in so doing killed her, that would be murder."

(Stephen, J., in *R.* v. *Serne and Goldfinch*, 16 Cox, C. C. 311.)

Homicide by Correction.

See *R.* v. *Hopley*, 2 F. & F. 202.
R. v. *Griffin*, 11 Cox, C. C. 402.

Homicide by neglect of Duty.

See 31 & 32 Vict. c. 122, s. 37.
R. v. *Morby*, 8 Q. B. D. 571.
R. v. *Downes*, 2 East, P. C. 997.
R. v. *Nicholls*, 13 Cox, C. C. 75.

Suicide. See *R.* v. *Jessop*, 16 Cox, C. C. 204.
R. v. *Dyson*, R. & R. 523.

To become an offence it must be committed by one who has arrived at years of discretion, and who is in his right mind.

Attempts to Murder.

See 24 & 25 Vict. c. 100, ss. 14, 15.
R. v. *Brown*, 10 Q. B. D. 381.

Conspiracy to Murder.

See 24 & 25 Vict. c. 100, s. 4.
R. v. *Most*, 7 Q. B. D. 244.

Wounding. See 24 & 25 Vict. c. 100, s. 20.
R. v. *Latimer*, 17 Q. B. D. 359.
R. v. *Stopford*, 11 Cox, C. C. 643.
R. v. *Tretwell*, L. & C. 443.
R. v. *Payne*, 4 C. & P. 558.
R. v. *Wood*, 1 Mood. C. C. 278.

It must be proved the skin is broken.

Grievous Bodily Harm.

See 24 & 25 Vict. c. 100, s. 20.

R. v. *Martin*, 8 Q. B. D. 54.

Mayhem is depriving a person of the use of a fighting member.

Assault is the offence of offering to do any violence to another in a threatening manner, *e.g.*, to shake one's fist at a person.

"The attempt or offer to beat a man without proceeding to touch him." (3 Bl. Com. p. 120.)

Finch. "All unlawful setting upon one's person." (3 Bl. Com. p. 120.)

Battery is the slightest touch or blow by one to another in anger. (3 Bl. Com. 120.)

Abduction—

(1) Any one unlawfully taking any unmarried girl under sixteen out of the custody of her father or lawful guardian, commits a misdemeanour. It is no defence that the defendant did not know her to be under the age of sixteen. (*R.* v. *Prince*, L. R. 2 C. C. R. 154.)

It is immaterial whether the girl consents or no, or whether the motive be a pure one or otherwise. (*R.* v. *Booth*, 12 Cox, C. C. 231.)

(2) Any one who takes a woman of any age away by force, with intent to marry or defile, commits a felony.

(3) It is a felony to take away a woman on account of her fortune against her will, or if under

twenty-one, against the will of her lawful guardian.

(4) It is a misdemeanour, by sect. 7 of the Criminal Law Amendment Act, 48 & 49 Vict. c. 69, to take any girl under the age of eighteen with the intention of carnally knowing her.

Rape. (24 & 25 Vict. c. 100, ss. 48 and 63.)

This is the offence of forcibly knowing a woman carnally against her will.

A husband cannot be guilty of rape on his wife, nor can a boy under the age of fourteen, even though he may have reached the years of puberty, though both the former and the latter may be charged as principals in the second degree.

If the woman consents to the perpetration of the offence through duress, it is still rape.

Abortion. See 24 & 25 Vict. c. 100, s. 58, which says as follows:—

"Every woman being with child who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means, whether with the like intent, and whosoever with the intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her, or caused to be taken by her, any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, &c."

"Whosoever shall unlawfully supply or procure any

poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, is guilty of a misdemeanour."

The harmful composition of the article supplied is of no consequence. The gist of the offence is the *intention* of the administrator or supplier.

"If a person administers a bit of bread with intent to procure abortion, the offence is sufficiently constituted." (Vaughan, B., in *R.* v. *Coe*, 6 C. & P. 403.)

See *R.* v. *Cramp*, 14 Cox, 390.

If a person does an act whereby a child is born immaturely and dies in consequence, that would amount to murder. (*R.* v. *West*, 2 C. & K. 784.)

Concealment of Birth. 24 & 25 Vict. c. 100, s. 60, which says:—

"If any woman shall be delivered of a child, every person who shall by any secret disposition of the dead body of the said child, whether such child die before, at or after birth, endeavour to conceal the birth thereof, shall be guilty of a misdemeanour," &c.

See *R.* v. *Brown*, L. R. 1 C. C. R. 244.
R. v. *Turner*, 8 C. & P. 755.
R. v. *Williams*, 11 Cox, 584.
R. v. *Sleep*, 9 Cox, C. C. 559.

"The concealment must be by a secret disposition of the body, and a disposition can only be secret by placing

it where it is not likely to be found; secrecy is the essence of the offence." (Byles, J.)

Sodomy. (24 & 25 Vict. c. 100, s. 61.)

"Whosoever is convicted of the abominable crime of buggery, either with mankind or with an animal (bestiality) shall be liable to be kept in penal servitude for life."

Part II.

CRIMINAL PROCEDURE AND EVIDENCE.

Chapter I.

Arrest. This may be effected either with or without a warrant.

A Warrant is a command in writing directed to some officer, ordering him to bring the offender before the justices, for the purpose of having him legally dealt with.

The warrant must state the offence, describe the offender, and order the person to whom it is directed to apprehend the accused.

Example of a Warrant:—

To the constables of ———, and to all other peace officers in the county of ———.

Whereas A. B., of ——— (*here state occupation*), hath this day been charged upon oath before the undersigned, one of Her Majesty's Justices of the Peace in and for the said county of ———, for that he on the ——— day of ———, 18—, did ——— (*here state offence*).

These are therefore to command you, in Her Majesty's name, forthwith to apprehend the said A. B., and to bring him before me or some other of Her Majesty's Justices of the Peace in and for the said county, to answer unto the said charge, and to be further dealt with according to law.

Given under my hand and seal this —— day of ———, in the year of our Lord, 18 —, at ——— in the county aforesaid.

On a complaint being made before one or more justices that any treason, felony, or misdemeanour has been committed or is suspected of having been committed, within the jurisdiction, or that the alleged offender, having committed it elsewhere, resides within the jurisdiction, the justice may issue either a warrant or a *summons*, issuing the latter first requiring him to attend before him, and then if this is not obeyed he may issue a warrant.

The Summons is directed to the accused; it must be served by a constable or other police officer. The person who serves it must attend at the trial.

Before the issue of a warrant a justice of the peace must have an information and complaint in writing, and on the oath of the informer.

In a summons this information may be without oath and on parole. (11 & 12 Vict. c. 42, ss. 3 and 8.)

The officer who delivers the warrant need not show it if he tells its substance. It is executed by apprehending the accused.

If the accused is not found in the jurisdiction of the justice by whom the warrant was issued, or if he reside out of the jurisdiction, any justice of the peace of any other county may upon oath of the proof of the handwriting of the justice of the peace so endorse the warrant, which is called *Backing a Warrant*, and thereby making it liable to be executed.

English warrants may be "backed" in Scotland, Ireland, and *vice versâ*.

Warrants may be granted on a Sunday.

Bail. In cases of treason, under the Queen's Bench order justices of the peace can bail, otherwise no.

In other felonies and higher misdemeanours justices of the peace must use their own discretion.

In minor misdemeanours justices are *primâ facie* bound to admit to bail; if they refuse, they may be compelled to do so by a "mandamus" from the Queen's Bench Division.

Indictment. An indictment is a written accusation of two or more persons of a crime preferred to and presented on oath by a grand jury. (2 Hawk. c. 25, s. 4.)

According to Lord Hale (2 Hale, P. C. 169) an indictment should be a plain, brief, and certain narrative of an offence committed by any person, and of those necessary circumstances that concur to ascertain the fact and its nature.

There are three parts of an indictment—

(a) **The Commencement**; Venue.

(b) **The Statement.**

(c) **Conclusion.**

(a) **The Commencement** contains the **Venue.** At common law the venue was always laid in the county where the offence was committed. But now this has been altered by statute.

The venue may be laid in the county where the offence was committed, or where the property was found, or where the offender was arrested.

(b) **The Statement.** This must contain clearly and accurately all the items of the offence, facts and circumstances which associate the defendant with it.

The defendant must be charged directly with having committed the offence.

The defendant must not be charged in one count of the said indictment with having committed two or more offences (burglary and embezzlement excepted).

Several defendants may be joined in the same indictment, but two or more can not be jointly indicted for perjury, blasphemous or seditious words.

At law, any number of offences may be charged in different counts of the indictment, but in practice not more than one felony can be charged in one indictment.

An indictment may charge the same felony in different ways in several counts. Indictments for misdemeanours may contain several counts for different offences.

An indictment lies for all treasons and felonies, for misprision of treason and felony, and for all misdemeanours of a public nature at common law.

An indictment will not lie for a mere private injury against a person.

As stated, indictments are tried within the jurisdiction where the offence is committed, or where the venue is laid.

The place of trial is changed by the **Writ of Certiorari.** This writ is issued out of the Queen's Bench Division to the judges or judge of an inferior Court, commanding him or them to return the records of a certain indictment or inquisition, in order that the party may have the benefit of trial before the Queen's Bench.

This writ is demanded as of right by the Crown, but if a private person demands it, the Court has discretion to grant or refuse it.

A private person on asking for it must state on affidavit—

(1) That the inferior Court cannot determine the point of law in question ;

(2) That there is no likelihood of a fair trial being held in the original jurisdiction.

See 16 & 17 Vict. c. 30, s. 4.

If the writ has been obtained improperly, the Court may award a **Writ of Procedendo,** sending back the record to the original jurisdiction.

A Nolle Prosequi is a motion to stay proceedings on an indictment. It does not act as an acquittal, and the person is liable to be re-indicted.

An Information is a written accusation of misdemeanour filed in the Queen's Bench Division, either by the Attorney-General or by the Master of the Crown Office at the instance of an individual, when a person is

put on his trial without the previous finding of a grand jury.

Form of an Indictment—

Central Criminal Court, to wit:

The jurors for our Sovereign Lady the Queen, upon their oath, present that A. B. did, on the —— day of ——, 18— (*here state particulars of the crime*), *e.g.*, larceny "of the goods of one ——, one hat" (*then follow expressions describing the offence*)—

"feloniously did steal and carry away" (larceny);

"feloniously did kill and murder" (murder);

"feloniously did kill and slay" (manslaughter).

When an indictment is found in a misdemeanour the Writ of "**Venire facias ad respondendum**" is issued ordering the party to appear.

If he doesn't appear in answer to this a **Writ of "Distringas"** may be issued.

If he still fails to appear, and the sheriff states he has no real property, a "**Capias ad respondendum,**" ordering the sheriff to bring him to answer the charge.

If he does not appear after the first "Capias" a second and third may be issued, termed an "**alias**" and a "**pluries capias.**"

If this has no effect the accused is liable to **outlawry.**

In felonies a **capias** may be issued first, and the mode of procedure is conducted in the same way as above-mentioned.

Steps at a Criminal Trial.

(1) **Arraignment**:—*i.e.*, calling the accused by name to the bar, reading the indictment to him, and asking for his plea, "Are you guilty or not guilty?"

(2) **The Pleas**:—

(a) **Plea to the Jurisdiction** } Termed dilatory. Pleas now virtually obsolete.
(b) **Plea in Abatement** . . }

(c) **Special Pleas**:—

(1) **Autrefois Acquit**, *i.e.*, that the defendant has been tried for the same offence before and has been acquitted.

(2) **Autrefois Convict**, *i.e.*, the defendant has been tried and convicted of the same offence before.

(3) **Autrefois Attaint** (obsolete), formerly a person attainted was considered legally dead.

(4) **Pardon.**

(d) "**Not Guilty.**" Here defendant puts himself on his country for trial.

Demurrer is an objection by the defendant to the facts contained in the indictment, while admitting them to be true, that they do not constitute in law the crime with which he stands for trial.

(3) **Calling, Challenging, Swearing the Jury.**

Challenges: (a) For **Cause.**

(1) **To the Array**, where the whole panel of jurymen is objected to.

(2) **To the Polls**, where particular jurymen are objected to.

(1) **To the Array.** This is divided into—

(1) **Principal Challenge**, *e.g.*, by reason of some partiality as regards the sheriff.

(2) **Challenge for Favour.** Where the partiality is not so apparent. These should be in writing.

(2) **To the Polls**, also **Principal Challenge** and **for Favour.** These are made orally.

Principal Challenges:—

(1) **Propter honoris respectum**, *e.g.*, where a lord or a peer is sworn on the jury.

(2) **Propter defectum.** On account of one of the jury being too old, too young, or an alien.

(3) **Propter affectum.** On account of some partiality, as if one of the jury was related to the defendant.

(4) **Propter delictum.** Where one of the jury has been convicted of treason or perjury, &c., and has not been pardoned.

Challenges for Favour are used when there is a certain amount of suspicion but not enough to constitute a principal challenge.

Peremptory Challenge.

In felonies the prisoner may challenge a certain number of the jury without showing cause. Not so in misdemeanours.

In treason, *except* attempts on the Queen's life and person, the prisoner may challenge 35. (39 & 40 Geo. 3, c. 93.)

In such case, murder, and other felonies, the number is 20. (6 Geo. 4, c. 50, s. 29.)

Summary Jurisdiction Act.

(1) It regulates and protects the proceedings before justices of the peace at petty sessions.

(2) Offences triable are small felonies and misdemeanours.

(3) The greatest punishment for a child (under 12) is one month or 2*l.* fine; (between 12 and 16) three months or 10*l.* fine; adults, six months or 20*l.* fine.

(4) The accused must have the option of being dealt with summarily or being sent for trial by a jury.

Chapter II.

Evidence.

Definition of Evidence. "Evidence includes all the legal means exclusive of mere argument which tend to prove or disprove some matters of fact, the truth of which is submitted to judicial investigation." (1 Tayl. Ev. 1.)

In every case the best evidence must be given, and if it is not obtainable secondary evidence is admissible after the absence of the best evidence has been accounted for.

In a written instrument the writing of it is the best and only evidence of its terms. Oral evidence is admissible to explain but not to contradict it.

Oral evidence may be given if the writing is destroyed, cannot be found, or the person who has it refuses to produce it, having received notice to do so.

The fact of the existence of a writing may be proved without producing the writing, but not any part of its contents. (*Darley* v. *Ousely*.)

There are no degrees in secondary evidence. (*Brown* v. *Woodman*, 6 C. & P. 206.)

Circumstantial Evidence consists in inferences drawn from established facts.

Presumptive Evidence. This is where an inference as to a disputed fact is to be presumed from certain other facts.

"A presumption of any fact is properly an inference of that fact from other facts that are known." (*R.* v. *Burdett*, 4 B. & Ald. 95, at p. 161.)

Presumptions are (1) of fact.
(2) of law.

(1) **Presumptions of fact** are rebuttable, and even if not rebutted are not conclusive.

Presumptions of law are—

(a) Rebuttable (*juris*), *e.g.*, a child between the ages of seven and fourteen cannot commit a crime, rebutted by evidence of precocity.

(b) Irrebuttable (*juris et de jure*), *e.g.*, a child under seven years of age cannot commit a crime.

In each case they are conclusive.

Hearsay Evidence (second-hand evidence) is where one person says what another has told him. It is generally inadmissible. For these reasons, because it is—

(1) Not given on oath.

(2) The party affected by it has no opportunity of examining the originator of it.

But in the following cases it may be received as evidence—

(1) In proving a person's death beyond the sea.

(2) In matters of public and general interest, matters of pedigree, to prove a custom, or prescription.

(3) Dying declarations in cases of homicide (murder and manslaughter) made by a person fully conscious of immediate death (see *post*, pages 63, 64).

Dying declarations of an accomplice are receivable. (*R.* v. *Tinkler.*)

(4) Statements made by deceased persons if against their interests; entries made by them strictly in the course of their duty or trade.

(5) When the evidence is of a witness's former statement, to confirm or invalidate what he says when before the court.

(6) The sayings and declarations of third parties which relate to the essential subject matter and not of its surrounding circumstances.

(7) Evidence of general character or reputation.

(8) Statements of persons not before the court which form part of the "*res gestæ.*"

(9) When the bodily or mental feelings of a person have to be proved evidence of statements of such individual at the time in question regarding such feelings are admissible. (1 Tayl. Ev. 496.)

Confessions. "The statement of a prisoner as to the circumstances of a crime with which he is charged is evidence against himself unless it has been obtained from him by a person in authority, and who in that capacity induced him to confess by holding out an offer or prospect of forgiveness."

"To exclude a confession the inducement held out

should contain some promise or prospect of a temporal benefit." (*R.* v. *Wild.*)

"A confession is admissible if obtained by deception." (*R.* v. *Shaw.*)

If two persons are charged jointly the confession of one will not be evidence against the other. (*R.* v. *Appleby.*)

A prisoner may be convicted on proof of a confession without any further evidence.

A confession before a magistrate must be proved at the trial by the depositions.

Burden of Proof. "Et incumbit probatio qui dicit non qui negat"—in criminal law the burden of proof is on the prosecution.

But see :—38 & 39 Vict. c. 25.
24 & 25 Vict. c. 99, s. 24.
16 & 17 Vict. c. 107, s. 245.
38 & 39 Vict. c. 88, s. 4.
46 & 47 Vict. c. 3, s. 4 (1).
50 & 51 Vict. c. 28, s. 2 (1).
50 & 51 Vict. c. 28, s. 2 (11).

Where it lies on the accused to prove he acted innocently and lawfully.

Proving Handwriting.

(1) By calling the party who wrote.
(2) By calling the party who saw him write.
(3) By calling the party who saw him write once.
(4) By comparison.

(5) The Common Law Procedure Act and the Criminal Evidence and Practice Amendment Act, 1865, allow the witness to give his opinion as to authenticity.

Functions of Judge and Jury.

The Judge has to:—

(1) Explain the law to the jury.
(2) Decide upon the competency of a witness.
(3) Decide whether dying declarations are admissible.
(4) Determine as to the sanity of a witness.
(5) Determine whether words used in an ordinary sense have a defamatory meaning.
(6) Decide whether a communication is privileged.

The Jury have to decide:—

(1) What is gross negligence, reasonable skill, malice?
(2) As to the credibility of evidence.
(3) Whether the alleged libellous matter may or may not be fair criticism.
(4) On all matters of fact.

Relating to Witnesses.

Affirmation was allowed to certain witnesses by the Common Law Procedure Act, 1854.

By the Evidence Further Amendment Act, 1869,

affirmation is allowed instead of an oath if the oath would have no binding effect.

Husband and wife may be witness for or against the other in cases of:—

(1) Treason.
(2) Personal injury inflicted by one or the other.
(3) Under Conspiracy and Protection of Property Act, 1875.
(4) Explosive Substances Act, 1883.
(5) Army Discipline Act, 1870.
(6) Merchant Shipping Act, 1875.
(7) Criminal Law Amendment Act, 1885 (competent but not a compellable witness).

One witness only is required to establish a fact.

Exceptions:—(1) Treason (two required).
(2) Perjury (two required).
(3) Bastardy and affiliation.

Witness must confine himself to facts.

Exceptions:—On questions of identification.
Evidence of experts (received with caution).
Witnesses *re* character allowed.

Dying Declarations.

See *R.* v. *Jenkins*, L. R. 1 C. C. R. 187.

The declaration must be made by a party who if he or she had lived would have been a competent witness against the accused. (*R.* v. *Pike*, 3 C. & P. 598; *R.* v. *Perkins*, 2 Moo. C. C. 135.)

Dying declarations in favour of the accused are admissible. (*R.* v. *Scaife*, 1 Moo. R. 551.)

The declaration to be admissible as evidence must be made by a person fully confident that his or her death is close at hand, without any hope of recovery or a continuance of life. See *R.* v. *Smith*, 16 Cox, C. C. 170.

"There must be an unqualified belief in the nearness of death, a belief without hope that the declarant is about to die." "No hope of avoiding death." (Kelly, C. B. in *R.* v. *Jenkins*, L. R. 1 C. C. R. 187.)

"A settled hopeless expectation of immediate death." (Lush, J.) If a person makes the declarations under the above conditions, the fact that death does not take place until some time afterwards will not render the said declaration inadmissible as evidence.

It has been held in *R.* v. *Gay*, 7 C. & B. 230, that if a dying declaration has been taken down in writing and signed by the deceased, secondary evidence cannot be given of its contents.

ADDENDUM.

By the Sunday Observance Protection Act, 1871 (34 & 35 Vict. c. 87), s. 1:—

"No prosecution or other proceedings shall be instituted against any person for any offence committed by him under the Lord's Day Act of Charles II., or for the recovery of any forfeiture or penalty for any such offence except by or with the consent in writing of the chief officer of police of the police district in which the offence is committed."

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